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SEC

SERVICE DATE – SEPTEMBER 1, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-290 (Sub-No. 254X)

NORFOLK SOUTHERN RAILWAY COMPANY—DISCONTINUANCE OF
SERVICE EXEMPTION—IN STANLY COUNTY, NC

STB Docket No. AB-290 (Sub-No. 274X)

YADKIN RAILROAD COMPANY—DISCONTINUANCE OF SERVICE
EXEMPTION—IN STANLY COUNTY, NC

STB Docket No. AB-149 (Sub-No. 2X)

WINSTON-SALEM SOUTHBOUND RAILWAY COMPANY—DISCONTINUANCE
OF SERVICE EXEMPTION—IN STANLY COUNTY, NC

MOTION FOR PROTECTIVE ORDER

Decided: August 31, 2006

In a decision served on August 11, 2006, the Board granted exemptions under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 for petitioners, Norfolk Southern Railway Company (NSR), Yadkin Railroad Company (YRC), a wholly owned NSR subsidiary, and Winston-Salem Southbound Railway Company (WSSB), a Class III switching carrier owned equally by NSR and CSX Transportation, Inc. (CSXT), to discontinue services, subject to an environmental condition and standard employee protective conditions. Specifically, NSR was granted an exemption to discontinue service over 11.11 miles of rail line (the Line) between milepost WF-0.00 at Halls Ferry Junction and milepost WF-11.11 at Badin in Stanly County, NC, which it operates under lease from YRC. YRC was granted an exemption to discontinue service over the Line, which it leases from Alcoa, Inc. (Alcoa), the owner of the Line's right-of-way, track, and improvements. WSSB was granted an exemption to discontinue service over the 5.21-mile portion of the Line between milepost WF-5.90 at Whitney, NC, and milepost WF-11.11 at Badin, which it and YRC jointly lease from Alcoa.

On August 25, 2006, Alcoa filed a motion for protective order, pursuant to 49 CFR 1104.14, to permit it to file under seal certain confidential documents and information in connection with a petition to reopen that it intends to file on or before September 5, 2006. According to Alcoa, these documents will include the workpapers underlying its previously made claim that NSR's Badin traffic is profitable. The Board

dismissed that claim as unsubstantiated in the August 11 decision. Alcoa states that the documents contain commercially or competitively sensitive information, including confidential rates charged by rail carriers connecting with NSR for traffic moving to and from Alcoa's Badin plant.

Petitioners filed a reply in opposition to Alcoa's motion on August 28, 2006. They contend that the documents and information Alcoa seeks to submit were used to make and support the revenue-to-variable-cost calculations Alcoa relied on in its reply and protest. As a result, they contend that this information cannot be admissible new evidence under 49 CFR 1152.25(e)(2)(ii). Additionally, petitioners challenge the relevance of the documents and information Alcoa seeks to submit subject to the protective order. They argue that the Board's decision was properly based on the applicable abandonment costing regulations which showed that the revenues from Badin traffic were insufficient to cover the costs of operating and maintaining the Line.

As indicated, this motion is related to a forthcoming Alcoa petition to reopen. Under 49 CFR 1152.25(e)(2)(ii), the Board will grant a petition to reopen only upon a showing that the Board's action would be affected materially because of new evidence, changed circumstances, or material error. Evidence on appeal, however, cannot be considered new evidence if before and during the record building stage of the proceeding it was reasonably available to the party seeking to submit it. See, e.g., Keokuk Junction Railway Company-Feeder Line Acquisition-Line of Toledo, Peoria and Western Railway Corporation between La Harpe and Hollis, IL, STB Finance Docket No. 34335, slip op. at 4-5 (STB served Feb. 7, 2005). Petitioners have requested that the motion be denied on grounds that the evidence Alcoa proposes to file is inadmissible.

It is, however, premature to decide now whether the evidence Alcoa seeks to submit is admissible new evidence within the meaning of 49 CFR 1152.25(e)(2)(ii). The motion otherwise conforms with the Board's rules at 49 CFR 1104.14 governing requests for protective orders to maintain the confidentiality of materials submitted to the Board. The motion will therefore be granted, subject to the Protective Order and Undertakings contained in the Appendix to this decision.¹ Issuance of the Protective Order will ensure that confidential information will be used solely for this proceeding and not for other purposes.

Finally, Alcoa notes that counsel for petitioners is in-house counsel for NSR and would be reviewing the highly confidential information that Alcoa intends to submit. This information concerns "rates from carriers other than [NSR] who originate or deliver Badin-related traffic." Alcoa asserts that there is no need for petitioners to hire outside counsel or consultants to protect it or these other carriers if NSR's in-house counsel signs the undertaking for highly confidential information in Exhibit B and otherwise complies with the protective order. Petitioners, while objecting to the motion for protective order,

¹ A proposed protective order and undertakings were included with the motion and will be adopted with minor revision.

do not object to the language in the Undertaking in Exhibit B. Accordingly, the language in Exhibit B, which refers specifically to NSR's in-house counsel, will be adopted.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Alcoa's motion for protective order is granted. The Protective Order and Undertakings contained in the Appendix to this decision are adopted with minor revision.

2. Alcoa's confidential information will be kept under seal by the Board and will not be placed in the public docket or otherwise disclosed to the public, unless the attached Undertakings are executed and the terms of the Protective Order are followed, or unless otherwise ordered by the Board.

3. This decision is effective on the service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

Appendix

1. For purposes of this Protective Order:

(a) “Confidential Documents” means documents and other tangible materials containing or reflecting Confidential Information or Highly Confidential Information.

(b) “Confidential Information” means traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost work papers); the confidential terms of contracts with shippers, or carriers; confidential financial and cost data; and other confidential or proprietary business or personal information.

(c) “Highly Confidential Information” means shipper-specific rate or cost data.

(d) “Designated Material” means any documents designated or stamped as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in accordance with paragraph 2 of this Protective Order and any Confidential Information or Highly Confidential Information contained in such materials.

(e) “Proceedings” means those before the Surface Transportation Board (“Board”) concerning the Petition for Exemption – Discontinuance of Service and Operating Rights Under Lease – Between Whitney, NC and Badin, NC in Stanly County, NC, STB Docket Nos. AB-290 (Sub-No. 254X), AB-290 (Sub-No. 274X), and AB-149 (Sub-No. 2X), and any related proceedings before the Board, and any judicial review proceedings arising from these dockets or from any related proceedings before the Board.

2. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, discovery response it produces, transcript of a deposition or hearing in which it participates, or of a pleading or other paper to be submitted, filed, or served in these Proceedings contains Confidential Information or Highly Confidential Information, or consists of Confidential Documents, then that party may designate and stamp such Confidential Information and Highly Confidential Information as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL.” Any information or documents designated or stamped as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” shall be handled as provided for hereinafter.

3. Information and documents designated or stamped as “CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, or to any person or entity except to an employee, counsel, consultant, or agent of a party to these Proceedings, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order

and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit A of this Protective Order.

4. Information and documents designated or stamped as “HIGHLY CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, or to any person or entity except to the following individuals who, before receiving access to such information or documents, have been given and have read a copy of this Protective Order and have agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit A of this Protective Order: (a) an employee, counsel, consultant, or agent of Alcoa Inc., or an employee of such counsel, consultant, or agent; or (b) an employee, counsel, consultant, or agent of Norfolk Southern Railway Company, or an employee of such counsel, consultant, or agent, that is not engaged in, and has no responsibility for, the establishment of shipping rates.

5. Any party to these Proceedings may challenge the designation by any other party of information or documents as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” by filing a motion with the Board or with an administrative law judge or other officer to whom authority has been lawfully delegated by the Board to adjudicate such challenges.

5. Designated Material may not be used for any purposes, including without limitation any business, commercial or competitive purposes, other than the preparation and presentation of evidence and argument in these Proceedings, any related proceedings before the Board, and/or any judicial review proceedings in connection with these Proceedings and/or with any related proceedings.

7. Any party who receives Designated Material shall destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the Board and retained by counsel for a party to these Proceedings) at the earlier of: (1) such time as the party receiving the materials withdraws from these Proceedings; or (2) the completion of these Proceedings, including any petitions for review or reconsideration, appeals or remands.

8. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the Board, unless the pleading or other document is submitted under seal, in a package clearly marked on the outside as “Confidential Materials Subject to Protective Order.” See 49 CFR 1104.14. All pleadings and other documents so submitted shall be kept confidential by the Board and shall not be placed in the public docket in these Proceedings except by order of the Board or of an administrative law judge or other officer in the exercise of authority lawfully delegated by the Board.

9. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to any forum other than the Board in these Proceedings unless: (1) the pleading or other document is submitted under seal in accordance with a protective order that requires the pleading or other document to be kept confidential by that tribunal and not be placed in the public docket in the

proceeding; or (2) the pleading or other document is submitted in a sealed package clearly marked, "Confidential Materials Subject to Request for Protective Order," and is accompanied by a motion to that tribunal requesting issuance of a protective order that would require the pleading or other document be kept confidential and not be placed in the public docket in the proceeding, and requesting that if the motion for protective order is not issued by that tribunal, the pleading or other document be returned to the filing party.

10. No party may present or otherwise use any Designated Material at a Board hearing in these Proceedings, unless that party has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting such Designated Material to the Board, to an administrative law judge or to another officer to whom relevant authority has been lawfully delegated by the Board, and has accompanied such submission with a written request that the Board, administrative law judge or other officer: (a) restrict attendance at the hearing during any discussion of such Designated Material; and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.

11. To the extent that materials reflecting Confidential Information or Highly Confidential Information are produced by a party in these Proceedings, and are held and/or used by the receiving person in compliance with paragraphs 1, 2, 3 or 4 above, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11904 or of any other relevant provision of the ICC Termination Act of 1995.

12. Any party that files with the Board a document containing Confidential or Highly Confidential Information must simultaneously file with the Board a public version of that document.

13. All parties must comply with all of the provisions of this Protective Order unless the Board or an administrative law judge or other officer exercising authority lawfully delegated by the Board determines that good cause has been shown warranting suspension of any of the provisions herein.

14. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any Confidential Information or Highly Confidential Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information, Highly Confidential Information or Confidential Documents do not contain or reflect any Confidential Information or Highly Confidential Information originated by any other party.

Exhibit A

UNDERTAKING – CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on September 1, 2006, governing the production and use of Confidential Information and Confidential Documents in STB Docket Nos. AB-290 (Sub-No. 254X), AB-290 (Sub-No. 274X), and AB-149 (Sub-No. 2X), understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Docket Nos. AB-290 (Sub-No. 254X), AB-290 (Sub-No. 274X), and AB-149 (Sub-No. 2X), any related proceedings before the Surface Transportation Board (“Board”), or any judicial review proceedings in connection with STB Docket Nos. AB-290 (Sub-No. 254X), AB-290 (Sub-No. 274X), and AB-149 (Sub-No. 2X), and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as “CONFIDENTIAL,” other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that monetary damages would not be a sufficient remedy for breach of this Undertaking and that parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive or other equitable relief or both as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Signed: _____

Print: _____

Title: _____

Affiliation: _____

Date: _____

Exhibit B

UNDERTAKING – HIGHLY CONFIDENTIAL MATERIAL

I, _____, as senior counsel for Norfolk Southern Railway Company, have read the Protective Order served on September 1, 2006, governing the production and use of Confidential Information, Highly Confidential Information and Confidential Documents in STB Docket Nos. AB-290 (Sub-No. 254X), AB-290 (Sub-No. 274X), and AB-149 (Sub-No. 2X), understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information, Highly Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Docket Nos. AB-290 (Sub-No. 254X), AB-290 (Sub-No. 274X), and AB-149 (Sub-No. 2X), any related proceedings before the Surface Transportation Board ("Board"), or any judicial review proceedings in connection with STB Docket Nos. AB-290 (Sub-No. 254X), AB-290 (Sub-No. 274X), and AB-149 (Sub-No. 2X), or with any related proceedings. I further agree not to disclose any Confidential Information, Highly Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," other than file copies that may only be kept by outside counsel, of pleadings and other documents filed with the Board.

Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons in the employ of Norfolk Southern Railway Company that are engaged in, or have responsibility for, establishing shipping rates, or to other persons or entities for which I am not acting in this proceeding. I will promptly destroy all notes or documents containing such Highly Confidential Information.

I understand and agree that monetary damages would not be a sufficient remedy for breach of this Undertaking and that parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy.

Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Signed: _____

Print: _____

Title: _____

Affiliation: _____

Date: _____